FILED
JUN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GEORGE T. ACRI, *et al.*,
Petitioners,
v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT LODGE 115 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND LOCAL LODGE 68 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
CONCLUSION	16

TABLE OF AUTHORITIES

CASE: Page

Anderson v. United Paperworkers, 641 F.2d 574 (8th Cir. 1981) 11
Aragon v. Teamsters Local 572, 106 S.Ct. 229 (1985) 15
Barnett v. United Air Lines, 738 F.2d 358 (10th Cir. 1984) 14
Bedat v. McLean Trucking Co., 105 S.Ct. 2325 (1985) 15
Bowen v. United States Parcel Service, 459 U.S. 212 (1983) 10
Brown v. UAW, 689 F.2d 69 (6th Cir. 1982) 12
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 14
Clayton v. Automobile Workers, 451 U.S. 679 (1981) 9
Czosek v. O'Mara, 397 U.S. 25 (1970) 10
Davis v. United Auto Workers Local 970, 106 S.Ct. 1284 (1986) 15
Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir. 1977), *cert. denied*, 434 U.S. 837.. 12
DelCostello v. Teamsters, 462 U.S. 151 (1983) ....*passim*
Electrical Workers v. Foust, 442 U.S. 42 (1979).... 10, 11
Freight Checkers v. Alderson, 105 S.Ct. 3504 (1985) 15
Glover v. United Grocers, 105 S.Ct. 2357 (1985).... 15
Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984) 14
Gray v. Meat Cutters, 736 F.2d 1055 (5th Cir. 1984) 14
Greyhound Lines v. Wilhite, 106 S.Ct. 280 (1985).. 15
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 9
Humphrey v. Moore, 375 U.S. 335 (1964) 8
Landahl v. PPG Industries, 746 F.2d 1312 (7th Cir. 1984) 14
Lincoln v. District 9, 723 F.2d 627 (8th Cir. 1983).. 14
Local 1020 v. McNoughton, 105 S.Ct. 291 (1984).... 15
Mauget v. Kaiser Engineers, Inc., 106 S.Ct. 496 (1986) 15

TABLE OF AUTHORITIES—Continued

	Page
Murray v. Branch Motor Employees, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287	14, 15
Palmer v. Connecticut Railway & Lighting Co., 311 U.S. 544 (1941)	13
Perez v. Dana Corp., 418 F.2d 581 (3d Cir. 1983)	14
Rodman v. Hensley, 105 S.Ct. 202 (1985)	15
Rogers v. Lockheed Georgia, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287	14, 15
Salisbury v. James River Corp., 106 S.Ct. 807 (1986)	15
Saville v. Westinghouse Elec. Corp., 106 S.Ct. 280 (1985)	15
Scaglione v. Communications Workers Local 1395, 106 S.Ct. 251 (1985)	15
Smith v. General Motors, 747 F.2d 372 (6th Cir. 1984) (en banc)	14
Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1930)	12, 13
Taylor v. United Auto Workers Local 980, 106 S.Ct. 849 (1986)	15
Teamsters v. Edwards, 104 S.Ct. 1599 (1984)	15
United Parcel Service v. Mitchell, 451 U.S. 56 (1981)	9
Vaca v. Sipes, 386 U.S. 171 (1967)	9, 10, 11
Welyzcko v. U.S. Air., 733 F.2d 239 (2nd Cir. 1984)	14, 15

STATUTES:

Labor Management Relations Act of 1947	
§ 9, 29 U.S.C. § 159	2
§ 301, 29 U.S.C. § 301	2
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*	5

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents International Association of Machinists and Aerospace Workers, District Lodge 115 of the International Association of Machinists and Aerospace Workers, and Local Lodge 68 of the International Association of Machinists and Aerospace Workers (hereinafter collectively referred to as the "Union" or "respondents") respectfully pray that this Court deny the Petition for a Writ of Certiorari filed on May 5, 1986, by petitioners.

COUNTERSTATEMENT OF THE CASE [1]

At all times relevant herein, petitioners were employed by American Can Company ("the Company") at its Brisbane, California plant and were represented for purposes of collective bargaining by the Union. The Company and Union were parties to a series of successive, three-year collective bargaining agreements, the last of which prior to the events in question in this case was signed in 1974. That agreement provided, *inter alia*, for a trust fund from which, in the event the Company closed the plant, terminated employees would receive severance pay at the rate of one week's pay for each year of an employee's service. The agreement further provided that severance pay "will be payable only from such fund," so that the funding limit for the trust placed a "cap" on the Company's liability for severance pay. Pet. App. 2, 16.

On May 1, 1977, upon the expiration of the 1974 collective bargaining agreement, the employees of the Company commenced a strike. That strike lasted until June 17, 1977, when a new agreement was ratified. It is undisputed that the new agreement made no changes in the severance pay provisions of the 1974 agreement. That was made clear to the employees in late 1977 when each em-

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[1] The opinions below, jurisdiction, and statutory provisions involved are set forth at p. 2 of the Petition. Two corrections are required in these preliminary matters. First, the opinion of the court of appeals is now officially reported at 781 F.2d 1393 (1986). Second, contrary to the assertion of petitioners, this case does not involve § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, but rather involves a cause of action implied from § 9 of that Act, 29 U.S.C. § 159(a), which provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

ployee, including each petitioner, received a copy of the 1977 collective bargaining agreement in the form of "paste-in" pages to be inserted by the employee in his copy of the prior agreement in those places where changes had been made. Pet. App. 2.

On February 1, 1980, the Company informed its employees that it would be closing the plant. Shortly thereafter, the employees were advised that there was insufficient money in the trust fund to pay severance pay at the contractually-specified rate. The Union filed a grievance seeking full severance pay for the terminated employees but that grievance was denied by an arbitrator who ordered the Company to pay approximately 50% of the severance pay that would have been due absent the funding limitation. Pet. App. 2-3, 17.

On August 6, 1980, petitioners commenced this action.[2] Petitioners' complaint alleged that at the ratification meeting that had been held three years earlier, in June, 1977, Union representatives had led the employees to believe that, in the event of a plant shut-down, severance pay would not be capped. The principal relief petitioners sought in their complaint was payment by the Union of the difference between the amount of severance pay petitioners received and the amount they would have received in the absence of the funding limitation. Pet. App. 3, 17.

Following the filing of the complaint, the parties engaged in extensive discovery. In the course of that discovery, petitioners took the depositions of Joseph Fischer, the Company official directly responsible for handling the 1977 negotiations, and John Buly, the Company's Director of Labor Relations who worked with Fischer in an advisory role during the 1977 negotiations. Fischer's testimony, corroborated by Buly, established

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[2] As petitioners correctly note, the action was dismissed without prejudice pending the arbitrator's decision, and was refiled on January 14, 1982, three months after the arbitrator rendered his award.

that "there was no way" the Company would have agreed to increased severance pay in 1977 as the Company was "hurting very badly economically" and was seeking "relief in a number of areas." Indeed, Fischer testified that he was under specific instructions not to agree to any provision that would "add to any potential closing costs," and that eliminating the funding limit on severance pay would have added approximately $1,000,000 in the event of a plant closing.

At the close of discovery, the Union moved for summary judgment. For purposes of its motion only, the Union assumed the truthfulness of petitioners' allegation that a misrepresentation had occurred at the ratification meeting in June, 1977. The Union contended, however, that it was nonetheless entitled to summary judgment for two independent reasons: first, petitioners' complaint was untimely under the six-month limitations period which this Court held applicable to fair representation claims in *DelCostello v. Teamsters*, 462 U.S. 151 (1983); and, second, the evidence—in particular the testimony of the Company officials whom petitioners had deposed—established that petitioners could not prove a causal connection between the alleged misrepresentation and the injury for which petitioners sought redress, *viz.*, the limitation on the severance pay petitioners had received.

In opposing summary judgment, petitioners argued that the applicable statute of limitations was a three-year California statute under which, according to petitioners, their complaint was timely. With respect to the causation issue, petitioners sought to minimize the significance of the Company's testimony by arguing that

> [w]hile it is true that the company officials have testified that they were prepared to hold firm on [the severance pay] issue, common sense and experience indicate that it is *impossible for anyone to determine* in retrospect how long the [petitioners] would have remained on strike or *how the employer*

> *would have responded to that strike had the [Union's] misrepresentations not been made.*[3]

In making this argument petitioners necessarily conceded that "they cannot prove that they would have received greater severance pay had the misrepresentations not occurred." [4]

The district court granted the Union's motion for summary judgment. That court ruled that while petitioners' complaint was timely, Pet. App. 18-19, petitioners conceded inability "to prove that the alleged misrepresentation caused their injury" was fatal to petitioners' claim, *id.* at 25.

On appeal, the Ninth Circuit affirmed. That court agreed with the district court that the complaint was timely, reasoning that this Court's *DelCostello* decision was not to be applied retroactively except where doing so would lengthen the otherwise applicable state limitations periods, and that therefore the statute of limitations to be applied to the case was a three-year California statute which petitioners easily satisfied. Pet. App. 4-6. But the court of appeals also agreed with the district court that petitioners "must establish a causal relationship between the alleged misrepresentations and their injury" and that because petitioners conceded that they could not do so,

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[3] Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment in No. C82 0340 EFL (N.D. Cal.) at pp. 12-13 (emphasis added).

[4] *Id.* at 15. *See also* Pet. App. 8, 22 (discussing concession at oral argument.)

After oral argument but before decision on the motion for summary judgment, petitioners sought to amend their complaint to add a new claim under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* Plaintiff's counsel conceded that he had not pled such a claim previously for tactical reasons. The district court denied leave to amend, concluding that the amendment after the close of discovery would prejudice the Union by requiring a new round of discovery. The court of appeals affirmed this ruling by the district court, Pet. App. 11, and petitioners do not seek review of that holding here.

summary judgment was properly entered for the Union. *Id.* at 7.

REASONS FOR DENYING THE WRIT

In their apparent zeal to persuade this Court to issue a writ of certiorari in this case, petitioners misstate the issue that was presented to and decided by the lower courts. As we show in Part I, those courts did *not* hold that a plaintiff can "recover no remedy" on account of union misrepresentations, Pet. at 6, nor did the courts below "immunize" such misrepresentations, *id.* at 9; *see id.* at 11, 12. Rather, the courts below merely held that a fair-representation plaintiff is required to prove that a violation caused an injury before damages may be recovered on account of that injury. This unremarkable holding: accords with this Court's decisions involving the duty of fair representation; is consistent with the decisions of the other courts of appeals in this area; and follows more general principles that this Court has developed with respect to the burden of proving the fact (as distinguished from the amount) of damages. There is, therefore, no reason for this Court to grant a writ of certiorari in this case.

In addition, as we show in Part II, even if the courts below had decided a question of law that merited this Court's attention, this case would not provide a suitable vehicle for bringing that question before the Court. The threshold question in this case is whether petitioner's complaint was filed in a timely manner. The resolution of that question requires decision as to whether *DelCostello* is entitled to retroactive effect in all cases or, as the court below held, only in those cases in which the alternative state statute of limitations is shorter than six months. This Court's certiorari decisions make clear that the Court has concluded that the retroactivity of *DelCostello* is not a question that warrants this Court's attention.

I.

A. In attempting to extract from the decision below some ruling of general significance, petitioners overlook

the fact that throughout the proceedings in the lower courts petitioners left no doubt that they were seeking redress from the Union for a specific and clearly defined injury: the receipt of less-than-full severance pay. The district court expressly stated that this was the injury petitioners were seeking to remedy. Pet. App. 17.[5] And the court of appeals thought it so clear that the remedy petitioners were seeking was the difference between capped and uncapped severance pay that the court concluded that "there is no dispute concerning the amount of damages in this case." Pet. App. 10 n.2.[6]

Because the lower courts so clearly understood petitioners to have limited the focus of their claim, the decision of those courts is, of necessity, equally limited. All that the court of appeals has held is that to recover damages on account of an injury, a fair representation claimant must prove a causal relationship between that injury and the union's asserted wrong. Applying that principle here, the appellate court concluded that because petitioners sought redress for the denial of uncapped severance pay, they were required to prove that but for the Union's (alleged) misrepresentations, petitioners would have obtained such severance pay. But the decision below would not necessarily require the same type of proof of causation in *other* cases in which *other* types of injuries were asserted. Indeed, the appellate court's decision says nothing about whether *these* peti-

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[5] "Plaintiffs argue that they have been injured in relying on the misrepresentations to their detriment and that they are entitled to damages in the amount of the difference between what their severance pay would have been had the contract contained the terms stated in the Union's misrepresentation and what severance pay was actually paid by the Company." [Pet. App. 17].

[6] Even in this Court, although petitioners assert an "intangible" injury and make reference to "nominal damages" or "general damages," Pet. 11-12, 14, petitioners ultimately concede that what they are seeking is an order requiring the union "to honor its [alleged] commitments by paying [petitioners] the difference between what it [allegedly] promised [uncapped severance pay] and what the employer really agreed to [capped severance pay]," *id.* at 13.

tioners would have been entitled to any other remedies (such as "nominal" or "general" damages, *see* Pet. 12, 14) had a request for such remedies been pressed below. Thus petitioners' repeated suggestion that the decision below precludes any remedy for union misrepresentation is simply wrong.

B. The principle that a fair-representation plaintiff must prove that the union's wrong caused the injury for which the plaintiff seeks recovery is firmly embedded in the decisions of this Court; indeed, even the cases relied on by petitioners articulate this rule.

The decision by this Court that is most closely analogous is *Humphrey v. Moore*, 375 U.S. 335 (1964). In that case the union, in the course of a grievance proceeding, agreed to dovetail the seniority lists of two employers which had merged. The principal holding of *Humphrey* is that the union did not violate its duty of fair representation in reaching that agreement as "the union took its position honestly, in good faith, and without hostility or arbitrary discrimination." *Id.* at 350. But there was a subsidiary issue in *Humphrey*—whether the employees who were disadvantaged by the dovetailing agreement were denied an adequate opportunity to defend their interests at the hearing at which the agreement was reached. *Id.* The Court disposed of that argument by noting that "[t]here was no substantial dispute about the facts concerning the nature of the transaction between the two companies" and that the plaintiffs

> have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented. The trial court found it 'idle speculation to assume that the result would have been different had the matter been differently presented.' We agree. [*Id.* at 350-51.]

Thus, plaintiffs' failure in *Humphrey* to prove that "the result would have been different"—which is to say to prove that the alleged wrong (denial of an opportunity to be heard) caused injury to the plaintiffs—was fatal to their claim.

This Court has applied a similar rule in the context of a claim by a discharged employee against his union for failing to press a grievance over the discharge. The Court has repeatedly held that in such cases, "[t]o prevail against . . . the union," the employee must not only "carry the burden of demonstrating breach of duty by the Union" but must also show "that the[] discharge was contrary to the contract." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). *Accord, United Parcel Service v. Mitchell*, 451 U.S. 56, 62, 66-67 (1981); *Clayton v. Automobile Workers*, 451 U.S. 679, 683 n.4 (1981); *DelCostello v. Teamsters*, 462 U.S. 151, 164-65 (1983). This requirement reflects the Court's understanding that absent proof that the discharge was in breach of contract, the union's failure to press a grievance over the discharge cannot cause a cognizable injury to the employee.

A similar emphasis on causation is reflected in the Court's decision concerning the apportionment of liability between an employer and a union in circumstances in which a plaintiff proves both a wrongful discharge by the employer and a wrongful failure by the union to secure redress for the discharge. This Court first faced the apportionment issue in *Vaca v. Sipes*, 386 U.S. 171 (1967); the Court there concluded that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach," and the Court went on to hold that the determinative factor in establishing the extent of a union's liability is causation:

> The governing principle . . . is to apportion liability between the employer and the union *according to the damage caused by the fault of each.* Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but *increases in any if those damages causes by the union's refusal to process the grievance* should not be charged to the employer. [386 U.S. at 197-198; emphasis added]

Based on this principle the Court in *Vaca* held that the jury verdict holding the union liable for all losses incurred by the employee as the result of his discharge was improper. *See also Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) ("judgment against [unions] can in any event be had only for those damages that flowed from their own conduct"; it is permissible to sue the union without suing the employer because "[i]f both the union and the employer have *independently caused damage to employees*, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages *caused by each*") (emphasis added).[7]

In its most recent apportionment case, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), while the Court was divided in its assessment of the degree of damages attributable to the union, the Court was unanimous in reaffirming *Vaca's* "governing principle" that liability should be "apportion[ed] . . . between the employees and the unions according to the damages caused by the fault of each." 459 U.S. at 218, 223-24, n.13 (majority opinion); *id.* at 233-35 (White, J. dissenting). The majority in *Bowen* held the union liable for a portion of the employee's wage loss after the union breached its fair representation duty because in the majority's view "the union's breach of its duty of fair representation . . . caused the grievance procedure to malfunction resulting in an increase in the employee's damages," and

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[7] In *Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court, in holding that punitive damages may not be assessed in fair representation cases, relied on the "limitation on union liability" articulated in *Vaca* which limitation, the *Foust* Court explained

> reflects an attempt to afford individual employees redress for injuries *caused by union misconduct* without compromising the collective bargaining interests of union members in protecting limited funds. [*Id.* at 50; emphasis added.]

See also id. at 48-49 ("[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' right").

"[i]t would be . . . unjust to require the employer to bear the increase in the damages *caused by the union's wrongful conduct.*" *Id.* at 223 (emphasis added).

In sum, this Court's fair representation cases teach that union members may be awarded compensation only for injuries "*caused by violations* of employee rights," *Foust*, 442 U.S. at 48-49, and no more. That is precisely the principle the courts below applied, albeit in a somewhat different factual context than one this Court has confronted, in requiring petitioners here to prove, as a precondition to recovering the difference between capped and uncapped severance pay, that respondents caused petitioners to be denied uncapped pay.

C. Not surprisingly, given the authoritative teachings of this Court as discussed above, there is unanimity among the courts of appeals that causation must be proved to support recovery in fair representation cases. Two cases are especially significant, each of which is on all fours with the instant case, reaches the same result as the decisions below, and follows the very same reasoning as the courts below here adopted.

Anderson v. United Paperworkers, 641 F.2d 574 (8th Cir. 1981), is remarkably similar to the instant case in that it also involved an alleged misrepresentation by a union with respect to an employer's promise to pay severance pay. The Eighth Circuit held that in order to recover the unpaid severance benefits from the union, plaintiffs were required to establish that "but for [the] misrepresentations the severance pay would have been paid" by the employer. *Id.* at 580. *See also id.* at 579-580 & n.5. The *Anderson* Court, citing *Vaca v. Sipes*, *supra*, 386 U.S. at 197-98, stated that its conclusion was:

> consistent with the Supreme Court's mandate that a union be held accountable only for that portion of the employee's damages attributable to the union's breach of the duty of fair representation. [641 F.2d at 580.]

Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir. 1977), *cert. denied*, 434 U.S. 837, is in accord. There the Third Circuit held that despite proof that the union, in seeking contract ratification, falsely represented that it had sought but had been unable to secure from the employer certain contractual changes, there was no basis for union liability as "[t]here is no evidence that the voting outcome would have been different had the members been told the truth." *Id.* at 1013. The Court required plaintiffs to make a "demonstration of injury to the members proximately caused by the breach"; the court reasoned that "[i]n the absence of actual injury occasioned by the union's wrongful misstatements, imposing liability in the instant case would be punitive and discordant with the limited remedies available under the Act." *Id.* at 1019. *See also Brown v. UAW*, 689 F.2d 69, 71 (6th Cir. 1982) (union not liable for failing to monitor pension fund because company would not have complied with funding demands had they been made).

In short, there is no conflict among the circuits nor any confusion or uncertainty among the appellate courts on the issue presented here. Thus, nothing in the decisions of the lower courts warrants the issuance of a writ of certiorari in this case.

D. Finally, contrary to petitioners' suggestion, petitioners can derive no comfort from *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1930), and its progeny. As the court of appeals here correctly recognized, "[t]hese decisions appl[y] a liberal standard of proof in situations where the uncertainty concern[s] the *amount* or extent of damages, not where the very fact of damages [is] contested." App. 10 n.4 (emphasis in original).

Story Parchment makes this plain; it draws "a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained such damage and the measure of proof necessary to enable the jury to fix the amount." *Id.* at 562. With respect to

the former, *Story Parchment* teaches that only " 'damages resulting necessarily and immediately from the breach are recoverable, *and not those that are contingent and uncertain.*' " *Id.* at 563 (emphasis added). In contrast, as to "damages which are definitely attributable to the wrong and only uncertain in respect of their amount," *Story Parchment* teaches that it is "enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference," as the "wrongdoer is not entitled to complaint that "damages] cannot be measured with . . . exactness and precision." *Id.* at 562-63. *See also Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 560-61 (1941) ("certainty of the fact of damage is essential"; once established "a reasonable basis of computation" suffices to fix the amount).

Here, of course, as the courts below recognized, the dispute concerns the *fact* of injury—whether the alleged misrepresentations by the Union caused the limitation on severance pay of which petitioners complain. The amount of damage attributable to this injury—assuming it was caused by the Union—is easily ascertained and is *not* in dispute. And as the court below stated, there is "no authority which would allow a plaintiff to avoid his burden of proving a causal connection between the wrongful act and some amount of damages. Pet. App. 10 n.4.

Thus, the decision below is fully consistent with this Court's decision, outside of the fair-representation area as well as with the decisions in that area.

II.

Even if, contrary to what we have just shown, the legal question decided below merited this Court's attention, this case nonetheless would not present an appropriate vehicle for addressing that question. For the court of appeals here considered the causation issue only after concluding that petitioners' fair-representation complaint

was filed within the three-year state statute of limitations which that court deemed applicable. Pet. App. 4-6. And if this Court were to grant certiorari here, the Court would confront a threshold claim of untimeliness which respondents would raise in support of the judgment below.

That this untimeliness claim is a substantial one cannot be denied. The court of appeals concluded that petitioners' cause of action "accru[ed] . . . sometime between February 1, 1980 and February 14, 1980 when plaintiffs were informed that the plant would be closed and that severance pay would be limited." Pet. App. 5. Petitioners' complaint was filed on August 6, 1980, more than six months after the earliest date on which, according to the appellate court, petitioners' cause of action may have accrued. That court sustained the timeliness of the complaint on the theory that *DelCostello v. Teamsters*, *supra*, is not entitled to retroactive effect except "when the state statute of limitations was shorter than the six-month period provided by *DelCostello*," Pet. App. 4, and thus that California law, which provides a "longer statute of limitations . . . determines the timeliness of plaintiffs' cause of action." Pet. App. 5.

Every other circuit to consider this issue has reached the opposite conclusion with respect to the retroactivity of DelCostello.[8] Those courts have concluded that in order to assure that the "purpose and effect" of *DelCostello* is not significantly " ' retard[ed],' " *Chevron Oil Co. v. Hut-*

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[8] *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air.*, 733 F.2d 239 (2nd Cir. 1984), *cert. denied*, —— U.S. ——; *Perez* v. *Dana Corp.*, 418 F.2d 581 (3d Cir. 1983); *Murray v. Branch Motor Employees*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 53 L.W. 3287; *Gray v. Meat Cutters*, 736 F.2d 1055 (5th Cir. 1984); *Smith v. General Motors*, 747 F.2d 372 (6th Cir. 1984) (en banc); *Landahl v. PPG Industries*, 746 F.2d 1312 (7th Cir. 1984); *Lincoln v. District 9*, 723 F.2d 627 (8th Cir. 1983); *Barnett v. United Air Lines*, 738 F.2d 358, 264 (10th Cir. 1984) (applied retroactively without discussion); *Rogers v. Lockheed Georgia*, 720 F.2d 1247 (11th Cir. 1983); *cert. denied*, —— U.S. ——, 53 L.W. 3287.

son, 404 U.S. 97, 107 (1971), the ruling in *DelCostello* is entitled to retroactive effect in *all* cases, regardless of whether the alternative state limitations period is longer or shorter than six-months. These decisions giving *DelCostello* full retroactive effect are more faithful to the rationale of *DelCostello* than the Ninth Circuit's partial retroactivity ruling, for *DelCostello* is premised on the federal policy favoring "the relatively rapid final resolution of labor disputes." 463 U.S. at 168, and *DelCostello* teaches that although limitations period of less than six months may not be "long enough," lengthy state limitations periods are "too long," *id.* at 166.

The question whether *DelCostello* is entitled to full retroactive effect—and thus whether petitioners' complaint in this case was timely filed—is the threshold question in this case. This Court has made clear, by its certiorari practice, that the Court does not view that question as worthy of the Court's attention,[9] no doubt because the controlling principles in deciding when to apply a new rule retroactively were settled in *Chevron*, and because the task of applying those principles to a particular new rule of law is appropriately left to the lower courts for the relatively brief period of time until the cases that

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[9] The Court has denied certiorari on the retroactivity of *DelCostello* at least eighteen times. *Teamsters v. Edwards*, 104 S.Ct. 1599 (1984); *Local 1020 v. McNoughton*, 105 S. Ct. 291 (1984); *Rogers v. Lockheed-Georgia*, 105 S.Ct. 292 (1984); *Murray v. Branch Welyczko v. U.S. Air*, 105 S.Ct. 512 (1984); *Bedat v. McLean Trucking Co.*, 105 S.Ct. 2325 (1985); *Glover v. United Grocers*, 105 S.Ct. 2357 (1985); *Rodman v. Hensley*, 105 S.Ct. 2020 (1985); *Freight Checkers v. Alderson*, 105 S.Ct. 3504 (1985); *Saville v. Westinghouse Elec. Corp.*, 106 S.Ct. 280 (1985); *Greyhound Lines v. Wilhite*, 106 S.Ct. 280 (1985); *Aragon v. Teamsters Local 572*, 106 S.Ct. 229 (1985); *Scaglione v. Communications Workers Local 1395*, 106 S.Ct. 251 (1985); *Taylor v. United Auto Workers Local 980*, 106 S.Ct. 849 (1986); *Mauget v. Kaiser Engineers, Inc.*, 106 S.Ct. 496 (1986); *Salisbury v. James River Corp.*, 106 S.Ct. 807 (1986); *Davis v. United Auto Workers Local 970*, 106 S.Ct. 1284 (1986).

predate the announcement of the new rule are adjudicated. Accordingly, the posture of this case provides an independent reason for denying certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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